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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 361

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

MOTION FOR LEAVE TO SUBSTITUTE EXECUTOR OF THE ESTATE OF OSCAR POFE, DECEASED, AS PETITIONER.

MEYER ABRAMS,
Attorney for Petitioner.

SHULMAN, SHULMAN AND ABRAMS,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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Now comes John Rosko, Executor of the Estate of Oscar Pofe, Deceased, by Meyer Abrams, his attorney, and moves for leave to be substituted as petitioner for the Deceased, Oscar Pofe, as per suggestions attached.

MEYER ABRAMS,
Attorney for Petitioner.

AFFIDAVIT IN SUPPORT OF MOTION.

State of Illinois }
County of Cook } ss.

Meyer Abrams, being first duly sworn, on oath deposes and says that he is the attorney for the Petitioner, and for the Executor of the Estate in connection with the foregoing Petition.

Affiant further says that he mailed the Petition and Record, together with the filing fees, to the Clerk of the Court on September 17, 1947, during the lifetime of the deceased, but due to the fact that the office of the Clerk was closed on Sunday, September 21, 1947, it was not docketed until the following day, and during the interval Petitioner departed his life testate; that John Rosko is the Executor of the Estate and that Letters Testamentary were duly issued to him, as it more fully appears from the Letters which are filed together with this affidavit.

Affiant further says that he filed a notice for the designation of the record in connection with the petition on July 11, 1947 (R. 64), but that he was requested by the attorney for the respondent, Hayes McKinney, to delay the filing of the petition until the last few days of the expiration date, due to the fact that he was leaving on his vacation and he wanted to have the opportunity to file the answer upon his return, and for this reason affiant did not forward the petition for filing until September 17, 1947.

Affiant further says that on July 11, 1947, during the lifetime of the Petitioner, he moved in the Court of Appeals to recall the mandate and to stay the mandate pending the filing and disposition of the Petition for Writ of

Certiorari and that the court recalled the mandate on that day, and stayed the mandate pending the disposition of the petition for the issuance of the writ of certiorari.

And further affiant sayeth not.

MEYER ABRAMS.

Subscribed and sworn to before me this 1st day of November, 1947.

NAOMI KAPLAN,
Notary Public.

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Respondent.

SUGGESTIONS IN SUPPORT OF MOTION TO SUBSTITUTE EXECUTOR OF THE ESTATE FOR THE PETITIONER.

A STATEMENT OF FACTS.

The appeal to the United States Circuit Court of Appeals for the Seventh Circuit operated as a supersedeas, the Petitioner having given his Supersedeas Bond (R. 39). On July 11, 1947 the mandate was recalled and stayed pending the filing and disposition of the Petition for Writ of Certiorari (See Affidavit). The designation for the contents of the record in connection with the Petition for

Writ of Certiorari was filed on July 11, 1947 (R. 64). The record was certified by the Clerk on July 17, 1947 (R. 65). Respondent's attorney requested counsel for the petitioner not to file the petition until shortly prior to the expiration date because of his desire to leave on vacation and to have the opportunity to file his answer after his return and for this reason, the petition was not forwarded to the Clerk for filing until September 17, 1947 (See Affidavit).

The Petition was actually deposited in the post office on the 17th day of September, 1947 while the Petitioner was alive. It should be assumed that it reached the office of the Clerk early Sunday morning. The Petitioner died on that day and due to the fact that the Clerk's office was closed on Sunday, it was not docketed until the following day, September 22, 1947. The deceased's Executor was appointed October 29, 1947 and he now moves for leave to be substituted as the Petitioner in lieu of the deceased.

I.

The petition was mailed for filing during the life of the petitioner and his death did not affect the jurisdiction of this Court for the substitution of his executor in lieu of the deceased.

The motion for leave to substitute the executor of the Estate of the Deceased as Petitioner should be allowed under Rule 19 of this court, Rule 25 of the Rules of Civil Procedure, and under the Statute, 28 U. S. C. A., Section 778, as construed in *Myer* v. *Canton National Bank,* 109 F. (2) 31, 34; See also Moore's Federal Practice, 1946 Supp., page 34 construing Rule 25 of the Rules of Federal Procedure.

II.

The judgment did not become final until the expiration of two years from the date of the death of the petitioner and the motion to substitute the executor should be allowed.

The Petition was filed within the 90-day period. The fact that between the date of the mailing of the Petition and the date of the filing the Petitioner departed his life, does not affect it as the cause is still considered *pending*. The question when an action is pending is *governed by State law* (*Re*: *Cannaway*, 178 U. S. 421). A judgment on appeal which operates as a supersedeas does *not* become *final* under the Illinois law until the disposition of the Writ of Certiorari or a petition for leave to appeal which now takes the place of the Writ of Certiorari (Smith Hurd's Ill. Revised Statutes, Chapter 110, Section 199). The point raised by the respondent that the Petition for Writ of Certiorari operates as a *new* suit is *not* supported by any authorities, and the authorities on which respondent relies (pp. 44, 45) *apply to writs of error* which are *distinguishable* from *appeals*, the former being the commencement of a *new* suit, while the latter operates as a *continuance* of the original suit. (*Soden* v. *Claney*, 269 Ill. 98; *Unbehahn* v. *Fader*, 319 Ill. 250, 254; *Minneapolis & R. Co.* v. *Rock*, 279 U. S. 410). The respondent who is responsible for the filing of the Petition shortly prior to the date of the death of the petitioner as shown in the affidavit, should not be allowed to take advantage of this unfortunate situation.

For the foregoing reasons, we submit that the motion for leave to substitute the executor of the Estate of the Deceased as the Petitioner in this case should be allowed.

REPLY TO RESPONDENT'S ANSWER.

Respondent's statement of the matter involved is misleading and inaccurate.

In stating the allegations of the Complaint, respondent says (p. 3) that *"there is no averment in the Complaint that the substituted agreement of October* 22, 1937 *contained a provision that the defendant should pay plaintiff at the same rate of commission as to other agents"* and that *"an examination of that contract shows that no such term or provision is contained therein"*. In the next breath, respondent quotes from the substituted agreement "in relation to the commissions" that the commissions shall be at rates "as *now* or may be in the future mutually agreed upon". This *refutes* the statement that there is no allegation in the Complaint that the "rate" in the substituted agreement was the same as in the original agreement. The Complaint did *not* allege that the agreement of October 22, 1937 was a *substituted* agreement but on the contrary, it alleged (R. 3; par. 3) that the original agreement was *"modified"*, and that agreement was made a part of the Complaint as Exhibit "A", and this agreement *specifically* states in paragraph 1 (R. 6) that insofar as the commissions are concerned the *"rates"* are as *"now"* or may be in the future mutually agreed upon. *The existing rate is alleged* in the Complaint whereby it was agreed (R. 3; par. 2) *"to pay the plaintiff for his services rendered pursuant to the terms of said contract commissions at the same rate at which defendant was paying its other general agents at the same time for like services."* There was no allegation that this rate agreement was changed by any different arrangement, but on the contrary, it was alleged in paragraph 4 (R. 4) *that the defendant operated under that agreement until September* 1, 1940. It is evident, therefore, that the statement

in italics (pp. 3-4) that there is no allegation that the defendant should pay plaintiff at the same rate of commission as to other general agents, is completely a *distortion* of the complaint as alleged, particularly in view of the duty of the court *to consider the allegations in the most favorable light to the petitioner on* the motion for summary judgment. Respondent italicizes the words "rescinded all prior agreements" (p. 4) but in the same breath after quoting that part of the agreement that it supersedes all previous agreements, he also quotes the *exceptions* as to the "rate" of commissions which was *not superseded* but which was as it *then existed* or as it may be agreed upon in the future, so that this part of the agreement was *not rescinded.*

I.

A. None of the authorities cited under this point have any bearing on the questions involved in the Petition. These authorities stand for the proposition that where there is no genuine issue of fact the court may enter a summary judgment. Here, there is a genuine issue of fact, as shown in the Petition. The question whether the plaintiff and defendant ever entered into the agreement by the terms of which the defendant was to pay the plaintiff commissions at the same rate it was paying other general agents and whether the defendant paid the other agents 10% more than he paid the Petitioner and whether such facts were fraudulently concealed from the Petitioner are questions which were alleged in the Complaint, denied or evaded in the Answer, and *are questions of facts* which could not have been disposed of by the summary judgment.

B. We deem it unnecessary to reply to the argument under this point (pp. 21-24) in which respondent attempts

in vain to distinguish the cases, when there is no real distinction, and ***not a single case was cited in support of respondent's position.*** The statement (p. 25) that the claim of the petitioner involved matters that occurred subsequent to September, 1940 is ***refuted*** by the allegation in the Complaint in paragraph 4 (R. 4) which limits the claim to services performed "until September 1, 1940" and it specifically states in the same paragraphs that there was *excepted* therefrom services performed as to other provisions of the contract which remained in full force and effect, and the suit was not brought thereon.

C. The argument under C does not require a reply for the reason that it is founded on the *false* theory that the matters which arose subsequent to September 1, 1940 are the same transactions that were had prior to that date, and we have already shown that these were distinct matters, and the counterclaim was *not* compulsory. (*Measurment Corp.* v. *Ferris*, 10 F. R. S. 13a 11-4 decided February 18, 1947 C. C. A. 3).

II.

The conflict in the decisions of the various circuits were fully discussed in the Petition, and there is nothing in the argument of the respondent to show that they are in harmony.

III.

A. The argument under this point consists of a few lines, barren of argument or authorities, and, therefore, no reply is necessary.

B. The attempt to distinguish the authorities cited by the Petitioner (pp. 32, 33) are devoid of merit and no

reply is necessary. We desire to call attention to Rule 54(6) which provides that no judgment shall be entered unless there is a determination of the "claim" and "counterclaim".

C. The argument that the Complaint did not allege that the respondent agreed to pay the plaintiff as much as it paid to other similar agents has been shown above to be baseless.

IV.

A. The argument under this point that there was no genuine issue of fact remaining to be tried deserves no reply and we will merely refer to the Petition on this point.

B. The cases cited by Petitioner are not distinguishable and the *alleged* distinctions of the respondent (pp. 35, 40) are *without merit*.

V.

We consider it a burden upon this Court to reply to the argument under this point (pp. 41-44) and we will, therefore, not reply.

VI.

The argument under this point (pp. 44-47) needs no further reply except that which we have pointed out in the Motion for leave to substitute under Points I and II *supra*.

For the foregoing reasons, we urge that the Writ of Certiorari be granted.

Respectfully submitted,

MEYER ABRAMS,
Attorney for Petitioner.

SHULMAN, SHULMAN AND ABRAMS,
134 N. LaSalle St.,
Chicago, Illinois,
Of Counsel.